

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Charter Communications, Inc.) CSR-7049-Z
Request for Waiver of Section 76.1204(a)(1) of)
the Commission's Rules)
Implementation of Section 304 of the) CS Docket No. 97-80
Telecommunications Act of 1996)
Commercial Availability of)
Navigation Devices)

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 2007

Released: May 4, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. Charter Communications, Inc. ("Charter") has filed with the Chief of the Media Bureau the above-captioned waiver request (the "Waiver Request"), seeking a permanent waiver of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules for seven integrated digital set-top boxes. For the reasons stated below, we grant Charter a limited waiver until July 1, 2008.

II. BACKGROUND

A. Section 629 of the Act

2. Section 629(a) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to:

adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.

1 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the basic navigation device required by this rule is referred to as the "integration ban."

2 47 U.S.C. § 549(a).

Through Section 629, Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor (“MVPD”).³ Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”⁴ At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”⁵ Similarly, Congress also sought to avoid Commission actions “which could have the effect of freezing or chilling the development of new technologies and services.”⁶ Under Section 629(c), therefore, the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services.⁷

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000 a security element separate from the basic navigation device (the “host device”).⁸ The integration ban was designed to enable unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. MVPDs were permitted to continue providing equipment with integrated security until January 1, 2005, so long as modular security components, known as point-of-deployment modules (“PODs”),⁹ were also made available for use with host devices obtained through retail outlets. In April 2003, in response to a request from cable operators, the Commission extended the effective date of the integration ban until July 1, 2006.¹⁰ Then, in 2005, again at the urging of cable operators,¹¹ the Commission further extended that date until July 1, 2007.¹² In that decision, the Commission also stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”¹³

4. On January 10, 2007, the Media Bureau acted upon three requests for waiver of Section 76.1204(a)(1) of the Commission’s rules.¹⁴ The Bureau found that waiver was not warranted for any of

³ See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004) (“*BellSouth Waiver Order*”).

⁴ H.R. REP. NO. 104-204, at 112 (1995).

⁵ *Id.*

⁶ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

⁷ 47 U.S.C. § 549(c).

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998) (“*First Report and Order*”); 47 C.F.R. § 76.1204(a)(1).

⁹ For marketing purposes, PODs are referred to as “CableCARDS.”

¹⁰ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003) (“*Extension Order*”).

¹¹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) (“*2005 Deferral Order*”), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

¹² *Id.* at 6814, ¶ 31.

¹³ *Id.*

¹⁴ See *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”); *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 220 (2007) (“*Cablevision Order*”); *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 228 (2007) (“*Comcast Order*”). Collectively, these orders are referred to as the “*January 10 Orders*.”

the parties pursuant to Section 629(c) because none of the parties had demonstrated that waiver was necessary to assist in the development or introduction of a new or improved service.¹⁵ The Bureau also found that devices with two-way functionality did not meet the waiver policy announced in the *2005 Deferral Order* for low-cost, limited-capability set-top boxes.¹⁶

B. The Waiver Request

5. Charter requests that the Commission grant a waiver of the integration ban as applied to the specific set-top boxes described in its Waiver Request (the “Subject Boxes”).¹⁷ Each of the devices provides access to an electronic programming guide (EPG), pay-per-view (PPV), and video-on-demand (VOD) services, while no device includes DVR capability, HD output, broadband Internet access, or the ability to simultaneously tune multiple channels of video programming.¹⁸ In addition, it is our understanding that the Subject Boxes support the use of switched digital capabilities.

6. At the outset, Charter argues that the Commission must grant the Waiver Request because denial would thwart Congress’s stated goal of bringing “innovation, lower prices and higher quality for consumers,” and that grant of the Waiver Request would serve the public interest.¹⁹ Second, Charter argues that in the *2005 Deferral Order*, and in the brief and oral argument in the *Advance/Newhouse* case before the D.C. Circuit, the Commission recognized that a waiver of the integration ban could be appropriate for certain low-cost, limited-capability boxes.²⁰ Third, Charter asserts that denial of the Waiver Request would not further the goals of the integration ban. Charter reasons that its high-end set-top boxes (which Charter estimates will encompass more than half of all new set-top boxes placed into service after July 1, 2007) will be subject to the integration ban and that these boxes will ensure that Charter has a strong incentive to ensure that CableCARD technology functions properly.²¹ Finally, Charter argues that grant of the Waiver Request would promote the public interest because it would assist the development and consumer adoption of new and improved digital services, and it would provide a level playing field to allow Charter to compete with larger MVPD competitors.²²

C. Comments

7. A number of parties filed substantive comments,²³ both in support of²⁴ and in opposition

¹⁵ *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 11-15; *Cablevision Order*, 224-225, ¶¶ 12-16; *Comcast Order*, 22 FCC Rcd at 235-238, ¶¶ 15-23.

¹⁶ *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶¶ 16-20; *Comcast Order*, 22 FCC Rcd at 238-241, ¶¶ 24-30.

¹⁷ The devices for which Charter seeks waiver are the Motorola DCT-700 and DCT-2500e, the Scientific Atlanta Explorer 1840, Explorer 940 and Explorer 3200, and the Pace “Chicago” DC501p and “Indiana” DC 511p.

¹⁸ Waiver Request at 5.

¹⁹ Waiver Request at 1-2 (citing H.R. REP. NO. 104-204, 104th Cong., 1st Sess. 112 (1995)).

²⁰ Waiver Request at 3-5.

²¹ Waiver Request at 8-11. We note, however, that NCTA has filed a waiver request on behalf of all cable operators, including Charter, seeking deferral of the integration ban for all boxes until their deployment of downloadable security or December 31, 2009, whichever is earlier. If NCTA’s waiver request is granted, then Charter’s high-end set-top boxes in fact would not be subject to the integration ban. . See National Cable and Telecommunications Association Request for Waiver, CSR-7056-Z, at 1 (filed Aug. 16, 2006).

²² Waiver Request at 12-17.

²³ Commenters filing in response to Charter’s Waiver Request include: The American Cable Association (“ACA”), BigBand Networks, Inc. (“BigBand”), The Consumer Electronics Association (“CEA”), Harmonic, Inc. (“Harmonic”), Hewlett-Packard Company, et al. (the “IT Commenters”), Motorola, Inc. (“Motorola”), Pace Micro

to the Waiver Request.²⁵ Their arguments are set forth below.

8. Charter and its supporters assert that grant of the Waiver Request will not frustrate the goals of Section 629.²⁶ Commenters who support the Waiver Request insist that grant will not thwart common reliance because more than half of the devices Charter will deploy after July 2007 will have separated security.²⁷ Those commenters argue that the boxes for which Charter seeks waiver are low-end, limited-capability set-top boxes, and precisely the types of boxes that the Commission indicated it would entertain and favorably view.²⁸ Consumer electronics manufacturers disagree, arguing that grant of the Waiver Request would frustrate the goals of common reliance and Section 629 of the Act, and highlighting that Charter has had seven years to prepare for the integration ban and should not be rewarded for its failure to do so.²⁹ Commenters also disagree about whether the Subject Boxes' two-way functionality goes beyond what the Commission contemplated in the *2005 Deferral Order* when it sought to preserve a low-cost option for consumers.³⁰

9. Beyond those arguments, Sony takes issue with Charter's claim that it deserves a waiver because it faces intense competition from "larger" competitors.³¹ Sony asserts that cable is still the dominant video provider, and the industry's revenues continue to grow.³² Furthermore, Sony argues, the goal of the integration ban is to increase competition in the market for navigation devices, not in the MVPD market; because they are separate markets, a competitive navigation device market should not

Technology, PLC ("Pace"), Sony Electronics, Inc. ("Sony"), Terayon Communications Systems, Inc. ("Terayon"), and TiVo Inc. ("TiVo"). Parties that filed reply comments include: ACA, Cisco Systems, Inc. ("Cisco"), and Charter. A number of parties also filed substantive ex parte letters or letter comments, including Americans for Tax Reform, et al., the Black Leadership Forum, the Consumer Federation of America, et al., the Hispanic Federation, the Hispanic National Bar Association, Paul Hutchinson, Chris Llana, the League of Rural Voters, the National Black Chamber of Commerce, NCTA, and Samsung Electronics Co., Ltd. ("Samsung").

²⁴ ACA, Americans for Tax Reform, et al., BigBand, the Black Leadership Forum, Cisco, Harmonic, the Hispanic Federation, the Hispanic National Bar Association, the League of Rural Voters, Motorola, the National Black Chamber of Commerce, NCTA, Pace, Samsung, and Terayon each filed in support of the Waiver Request.

²⁵ CEA, the IT Commenters, Paul Hutchinson, Chris Llana, Sony, and TiVo each filed comments in opposition to the Waiver Request. The Consumer Federation of America, et al. filed a letter in opposition to the Waiver Request. *See* Letter from Consumer Federation of America, et al. to Kevin J. Martin, Chairman, Federal Communications Commission (November 15, 2006).

²⁶ *See, e.g.*, Charter Reply at 11, Harmonic Comments at 1.

²⁷ Charter Reply at 2, Cisco Reply at 3. Charter also asserts that common reliance will happen regardless of whether this Waiver Request is granted; even if the Commission grants waiver, Charter will deploy 20-25 times the number of CableCARD devices for every single CableCARD deployed for retail devices. Charter Reply at 2.

²⁸ Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (September 18, 2006) ("*NCTA Sept. 18 ex parte letter*").

²⁹ CEA Comments at 6-7, TiVo Comments at 3.

³⁰ *See, e.g.*, Pace Comments at 3-4; *NCTA Sept. 18 ex parte letter* at 2; Charter Reply at 13-14; TiVo Comments at 1, 4-5; CEA Comments at 5-7 (citing Charter Comm. Inc. v. FCC, 460 F.3d 31, 40-41 (D.C. Cir. 2006)); IT Commenters Comments at 2-3; Letter from Brian Markwalter, et al. to Kevin J. Martin, Chairman, Federal Communications Commission (November 7, 2006) ("*Consumer Federation Letter*"); Letter from Neal M. Goldberg, General Counsel, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission at 3-4 (October 30, 2006) ("*NCTA Oct. 30 ex parte letter*").

³¹ Sony Comments at 3.

³² *Id.* at 3 (citing Twelfth Annual Report to Congress on Video Competition at para. 7).

significantly affect the MVPD market.³³

10. Comments in support of the Waiver Request argue that grant would allow Charter to provide a low-cost set-top box option for consumers, which would advance its digital migration plan while keeping subscribers' bills affordable.³⁴ Those supporting the Waiver Request claim to support "forward-looking technologies" like downloadable security, but believe that the integration ban presents more of a hindrance to consumers than a benefit.³⁵ Charter claims that denial of the Waiver Request will impair its ability to offer digital simulcast to 2 million homes in 2007, and will force Charter to abandon its plan to move to digital simulcasts on all of its systems by 2009.³⁶ Opponents argue that the public would be better served by a competitive market for set-top boxes (which they assert can only be achieved through common reliance), as competition will lower prices and drive innovation.³⁷ CEA also asserts that set-top boxes with less functionality than the Subject Boxes could help Charter achieve its digital transition goals.³⁸ The IT Commenters argue that grant of the Waiver Request will provide the cable industry with no incentive to support new technologies, and will slow approvals for technologies like DTCP over IP.³⁹

11. Charter has made an additional argument in *ex parte* communications that it is uniquely burdened because of financial difficulties and its status as a rural operator.⁴⁰ Specifically, Charter cites its own filings with the Securities and Exchange Commission ("SEC") stating that "If [Charter is] unable to generate sufficient cash flow or access additional external liquidity sources, [Charter] may not be able to service and repay [its] debt, operate [its] business, respond to competitive challenges or fund [its] other liquidity and capital needs."⁴¹ Again citing its own SEC filings, Charter states that it has more than \$20 billion in outstanding debt obligations, which is "almost 11 times its annualized EBITDA."⁴² Charter also

³³ Sony Comments at 3-4.

³⁴ See, e.g., Pace Comments at 2-3, 5; BigBand Comments at 4.

³⁵ See, e.g., Letter from Lillian Rodriguez Lopez, President, Hispanic Federation, to Kevin Martin, Chairman, Federal Communications Commission at 1 (October 2, 2006) ("*Hispanic Federation ex parte*"); Letter from Joe Leonard, Jr., Ph.D., Executive Director, Black Leadership Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (September 28, 2006) ("*Black Leadership Forum ex parte*"); ACA Comments at 2-6; BigBand Comments at 2.

³⁶ Charter Reply at 2.

³⁷ See, e.g., CEA Comments at 3, 5, 11-12; Sony Comments at 2; IT Commenter Comments at 5; Paul Hutchinson Comments at 1.

³⁸ CEA Comments at 8.

³⁹ IT Commenters Comments at 5. DTCP over IP is a digital rights management encryption standard that allows a device to send encrypted audio and video signals to another device (e.g., from a set-top box to a television set, or from a television set to a portable media player). See generally Digital Transmission Licensing Administrator Home Page, <http://www.dtcp.com>.

⁴⁰ Letter from Neil Smit, President and Chief Executive Officer, Charter Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (February 12, 2007) ("*Charter Feb. 12 ex parte letter*"); Letter from Neil Smit, President and Chief Executive Officer, Charter Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 2, 2007) ("*Charter March 2 ex parte letter*"); Letter from Neil Smit, President and Chief Executive Officer, Charter Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (April 4, 2007) ("*Charter April 4 ex parte letter*");

⁴¹ *Charter Feb. 12 ex parte letter* at 2-3 (citing Charter Communications, Inc., Annual Report (Form 10-K), at 1 (Feb. 28, 2006)).

⁴² *Charter Feb. 12 ex parte letter* at 2 (citing Charter Communications, Inc., Quarterly Report (Form 10-Q), at 5-6 (Oct. 31, 2006)).

calls attention to the fact that “of the 639 U.S. counties in which Charter provides service ... 57% are majority rural.”⁴³ Charter points out that while cable systems operated by other large MSOs typically pass 200-600 homes per mile, Charter’s systems, excluding six headends, pass an average of 55 homes per mile.⁴⁴ Charter asserts that the relief it seeks is consistent with the Commission’s policy goal of increased broadband deployment in rural areas because the relief would offset the higher infrastructure costs associated with low-density systems.⁴⁵

III. DISCUSSION

12. Charter makes its request for waiver pursuant to Section 629(c) of the Act and Sections 76.7 and 76.1207 of the Commission’s rules.⁴⁶ Accordingly, we analyze its request pursuant to the waiver standards set forth in Section 629(c)⁴⁷ as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission’s rules. In addition, because Charter characterizes its request as one for “low-cost, limited capability” devices as described in the Commission’s *2005 Deferral Order*, we evaluate it under that waiver policy, as well. As discussed below, and consistent with the Bureau’s conclusions in the *January 10 Orders*, we find that we cannot grant Charter’s request for relief under either Section 629(c) or the waiver policy established by the *2005 Deferral Order*. In light of Charter’s demonstrated financial hardship, however, we conclude that the grant of a waiver to Charter under Sections 1.3 and 76.7 of the Commission’s rules is justified. We therefore grant Charter a limited, one-year waiver of the integration ban with respect to the Subject Boxes.

A. Section 629(c) of the Act

13. Section 629(c) states in relevant part that

[t]he Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.⁴⁸

As mentioned above, the principal goal of Section 629 of the Act is to foster competition and consumer choice in the market for navigation devices.

14. Charter argues that grant of the Waiver Request is necessary to assist in the development of its new and improved digital cable services.⁴⁹ According to Charter, those services include “more advanced parental controls, an interactive program guide, video-on-demand, digital picture quality, greater channel capacity, and specialized programming and packages of tiers, such as family or

⁴³ *Charter April 4 ex parte letter* at 1.

⁴⁴ *Id.* at 1-2.

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 1 (citing 47 U.S.C. § 549(c); 47 C.F.R. §§ 76.7(i) and 76.1207).

⁴⁷ Section 76.1207 of the Commission’s rules, 47 C.F.R. § 76.1207, implements Section 629(c) of the Act and tracks the language of that statutory provision almost verbatim.

⁴⁸ 47 U.S.C. § 549(c). Section 76.1207 of the Commission’s rules implements Section 629(c) of the Act and tracks the text of the statute nearly verbatim. 47 C.F.R. § 76.1207.

⁴⁹ Waiver Request at 12-14.

international packages.”⁵⁰ In addition, Charter states that denial of its Waiver Request would “derail[] Charter’s ambition to move nearly all of its systems to digital simulcast by 2009 in concert with the DTV transition.”⁵¹

15. As a general matter, we do not find compelling Charter’s argument that grant of the Waiver Request is necessary to assist the development or introduction of the majority of these services. First, we note that of the homes Charter passes, over 98 percent are passed with digital service.⁵² As a result, the digital services Charter describes are already available to nearly its entire customer base. Second, while it could be argued that a waiver under Section 629(c) would assist the development or introduction of virtually any service offered by an MVPD, we do not believe that Congress intended for us to interpret this narrowly tailored exception in such a lenient manner. Based on the facts presented, Charter has failed to show that a waiver is “necessary” here to assist in the “development or introduction” of new or improved services.⁵³ Indeed, as we stated in the *January 10 Orders*, such an interpretation would effectively negate any rules adopted pursuant to Section 629(a).⁵⁴

16. In addition, we note that Charter failed to request a waiver “for a limited time,” as required by Section 629(c).⁵⁵ This limit helps to ensure that the Commission progresses toward furthering the goal of a competitive market for navigation devices. Thus, on its very face, Charter’s waiver request fails to meet the requirements envisioned by Congress.

B. The 2005 Deferral Order

17. Charter next argues that the Waiver Request is consistent with the Commission’s *2005 Deferral Order* regarding waivers of the integration ban for low-cost, limited-capability set-top boxes.⁵⁶

⁵⁰ *Id.* at 12-13.

⁵¹ Charter Reply Comments at 2-3.

⁵² See Press Release, Charter Communications, Inc., *Charter Reports Fourth-Quarter and Annual 2006 Financial and Operating Results* (Feb 28, 2007), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=968283>; see also *Dishheads Again: Charter Blames Sub Losses on Low-Level Basic Subs*, CABLEFAX DAILY, Oct. 8, 2004 (reporting that Charter had the highest digital penetration in the industry).

⁵³ See *BendBroadband Order*, 22 FCC Rcd at 213, ¶ 13; *Cablevision Order*, 22 FCC Rcd at 225, ¶ 14; *Comcast Order*, 22 FCC Rcd at 237, ¶ 19.

⁵⁴ See *BendBroadband Order*, 22 FCC Rcd at 214, ¶ 14; *Cablevision Order*, 22 FCC Rcd at 225, ¶ 15; *Comcast Order*, 22 FCC Rcd at 236, ¶ 17.

⁵⁵ 47 U.S.C. § 549(c).

⁵⁶ Waiver Request at 3, 8-9; Reply at 2-3. In the *2005 Deferral Order*, the Commission stated that it would “entertain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.” 20 FCC Rcd at 6814, ¶ 36. While cable operators are not barred from filing waiver requests for low-cost, limited-capability set top boxes pursuant to Section 629(c), we find that waivers sought for such devices are more appropriately requested under the waiver policy articulated in the *2005 Deferral Order*. Specifically, the purpose of Section 629(c) is to provide waivers where “necessary to assist the development or introduction of a new or improved ... service,” whereas the waiver policy established in the *2005 Deferral Order* is directed at devices that provide solely the ability to view digital cable signals on analog television displays. Thus, we cannot envision a device that would satisfy the *2005 Deferral Order*’s waiver policy and at the same time meet the waiver standards of Section 629(c). See *Comcast Order*, 22 FCC Rcd at 238, ¶ 24, n.92. We remind parties that requests for limited-capability waivers must include “the full specifications for any device(s) for which waiver is sought.” *2005 Deferral Order*, 20 FCC Rcd at 6814, ¶ 36. We also note that to the extent a waiver request for a low-cost, limited capability set-top box does not meet the standard of Section 629(c), it will be evaluated under the Commission’s general waiver standard, to which the 90-day time limit in Section 629(c) does not apply. 47 U.S.C. § 549(c).

As explained in the *Comcast Order*⁵⁷ and the *BendBroadband Order*,⁵⁸ the Commission developed this waiver standard to address a specific governmental interest, emphasizing that “it is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition,”⁵⁹ and accordingly the low-cost, limited-capability waiver standard is a narrow one. Devices that include two-way functionality that is not necessary to make digital programming viewable on analog television sets do not meet this narrow waiver standard.⁶⁰ All of the Subject Boxes include this advanced two-way functionality,⁶¹ and therefore we conclude that the Subject Boxes do not meet the limited-capability standard announced in the *2005 Deferral Order*.

C. Section 1.3 and 76.7 of the Commission’s Rules

18. Charter also submitted its Waiver Request under the general waiver provision found in Section 76.7⁶² of the Commission’s rules.⁶³ In light of Charter’s demonstrated dire financial straits, we conclude that good cause exists for a limited, one-year waiver, and that such a waiver would serve the public interest in this specific instance. Moreover, we are sympathetic to the fact that Charter’s financial difficulties may be due, in part, to its predominantly rural customer base.⁶⁴

19. We acknowledge that Charter’s commitment to upgrade its systems is costly, and that this commitment has left Charter in an extraordinary financial situation. Charter asserts that in rural areas the digital transition costs more per subscriber because of higher distribution costs and a greater ratio of headends per subscriber.⁶⁵ We find that Charter adequately has demonstrated that this has left the company with very limited resources.⁶⁶ Charter asserts that it has had five consecutive years of negative free cash flow,⁶⁷ and that it has more than \$20 billion in outstanding debt obligations, which is “almost 11

⁵⁷ *Comcast Order*, 22 FCC Rcd at 239, ¶ 26.

⁵⁸ *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶ 17.

⁵⁹ *2005 Deferral Order*, 20 FCC Rcd at 6813, ¶ 37.

⁶⁰ See *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶¶ 16-20; *Comcast Order*, 22 FCC Rcd at 238-241, ¶¶ 24-30.

⁶¹ See Waiver Request at Exhibits B-H.

⁶² See 47 C.F.R. § 76.7 (“On petition by any interested party, ... the Commission may waive any provision of this part 76,”).

⁶³ We will also consider Charter’s Waiver Request under the general authority of Section 1.3 of the Commission’s rules. See 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion . . . if good cause therefor is shown.”)

⁶⁴ See *Charter March 2 ex parte letter* at 1, 4; *Charter April 4 ex parte letter*.

⁶⁵ *Charter March 2 ex parte letter* at 4.

⁶⁶ See *id.* at 2, Exhibit 1.

⁶⁷ *Id.* Charter’s showing of five years of negative free cash flow is similar to the showing considered in determining whether a station is a “failed station” for purposes of a waiver of the Commission’s local TV ownership rules. See, e.g., *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Definition of Radio Markets for Areas Not Located in An Arbitron Survey Area*, 18 FCC Rcd 13620, 13706 ¶ 221 (2003).

times its annualized EBITDA.”⁶⁸ As Charter asserts, this “negative cash flow contrasts markedly with other public MSOs, both large and small.”⁶⁹

20. While we have not been persuaded by others who have made speculative claims that the integration ban may impose a financial burden on their companies,⁷⁰ we are persuaded by Charter’s specific, unambiguous demonstration of its existing financial hardship.⁷¹ Accordingly, we conclude that good cause exists for a limited one-year waiver of the integration ban for the Subject Boxes, and that Charter has met the standard for waiver under Sections 1.3 and 76.7 of the Commission’s rules. In addition, if Charter believes that, as a result of continuing, non-speculative financial difficulties, an extension of the waiver beyond this initial one-year period is warranted, it may submit updated financial and other information for our consideration.

IV. CONCLUSION

21. For the reasons stated herein, we conclude that Charter’s Waiver Request, as submitted, does not justify a waiver under either Section 629(c) or the waiver policy articulated in the *2005 Deferral Order*. Nevertheless, we believe that, in light of Charter’s extraordinary financial difficulties, good cause exists for a limited, one-year grant of the Waiver Request pursuant to Sections 1.3 and 76.7 of the Commission’s rules. Further, if, after one year, Charter believes that a further extension is warranted, it may file updated financial and other information for review and request an extension. Upon such a filing, we will review the company’s financial status and situation at that time to determine whether further waiver is warranted.

⁶⁸ *Charter Feb. 12 ex parte letter* at 2 (citing Charter Communications, Inc., Quarterly Report (Form 10-Q), at 5-6 (Oct. 31, 2006)).

⁶⁹ *Id.* at 2. *See also id.* at Exhibit 1; *Charter Feb. 12 ex parte letter* at 2 and Exhibits 4-6.

⁷⁰ *See, e.g.,* Comcast Corporation’s Request for Waiver of 47 C.F.R. § 76.1204(a)(1), CSR-7012-Z, CS Docket No. 97-80 at 17-19 (April 19, 2006) (asserting that that the increased costs associated with the integration ban would slow Comcast’s transitions to all-digital platforms).

⁷¹ *See Charter Feb. 12 ex parte letter* at 2; *Charter March 2 ex parte letter* at 3.

V. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that, pursuant to Section 629(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 549(c), and Section 76.1207 of the Commission's rules, 47 C.F.R. § 76.1207, the request for waiver filed by Charter Communications, Inc of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS DENIED**.

23. **IT IS FURTHER ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3 & 76.7, the request for waiver filed by Charter Communications, Inc. of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS GRANTED IN PART** to allow Charter to deploy Motorola DCT-700 and DCT-2500e, Scientific Atlanta Explorer 940, Explorer 1840, and Explorer 3200, and Pace "Chicago" DC501p and "Indiana" DC511p integrated set-top boxes until July 1, 2008.

24. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau